(1)

No. 06- 061258

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RAYMOND ANTHONY MILLER,

Petitioner,

v.

TERRY J. HARGET and THE CITY OF RIVERDALE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MAURICE J BERNARD, III
Attorney for Petitioner
3717 Chamblee Dunwoody Road
Atlanta, Georgia 30341
(678) 530-0900

207036

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

The question presented is:

Will the Fourth Amendment prohibition against unreasonable searches and seizures permit warrantless searches of persons without an articulable suspicion of probable cause or criminal activity of foot?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	v
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Petition	7
I. The Eleventh Circuit's Standard Of What Constitutes A Search And Seizure Violates *Terry v. Ohio*, 392 U.S. 1 (1968) And Its Subsequent Construction	8
Conclusion	14

TABLE OF CITED AUTHORITIES

Page

Cases

Brower v. County of Inyo,
489 U.S. 593 (1989) 12

California v. Hodari D.,
499 U.S. 621 (1991) 9, 11

Cowles v. Peterson,
344 F. Supp. 2d 472 (E.D. Va. 2004) 11

Johnson v. Crooks,
326 F.3d 995 (8th Cir. 2003) 5

Marbury v. Madison,
1 Cranch 137 (1803) 13

Michigan v. Chesternut,
486 U.S. 567 (1988) 13

Terry v. Ohio,
392 U.S. 1 (1968) 7, 8

United States v. Perez,
443 F. 3d 772 (11th Cir. 2006) 7, 9

Constitutional Provisions

United States Constitution, Amendment IV
..... i, 2, 10, 13, 14

Cited Authorities

Page

Statutes and Rules

28 U.S.C. § 2101 1

28 U.S.C. § 1254 1

42 U.S.C. § 1983 ..... 2, 5, 13

O.C.G.A. § 40-6-253 12

U.S. Sup. Ct. R. 13.1 1

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Filed August 4, 2006 ..... 1a

Appendix B — Order And Opinion Of The United States District Court For The Northern District Of Georgia, Atlanta Division Dated May 27, 2005 ... 21a

Appendix C — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing Filed October 31, 2006 ... 41a

Raymond Anthony Miller respectfully petitions for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eleventh Circuit, dated August 4, 2006, is officially reported at 458 F.3d 1251, and is reproduced at App. A, 1a - 20a.

The Memorandum Opinion and Order of the U.S. District Court of the Northern District of Georgia, Atlanta Division, dated May 27, 2005, is reproduced at App. B, 21a - 40a.

The denial of Plaintiff's Petition for Rehearing in the Court of Appeals for the Eleventh Circuit is dated October 31, 2006 and is reproduced at App. C, 41a - 42a.

STATEMENT OF JURISDICTION

The judgment of the U.S. Court of Appeals for the Eleventh Circuit sought to be reviewed was entered on October 31, 2006. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed plus the time granted by this Honorable Court on January 24, 2007. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant Constitutional provision involved is the Fourth Amendment which reads as follows.

Amendment IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The relevant statutory provision involved is 42 U.S.C. § 1983 which reads as follows.

> 42 U.S.C. § 1983 Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial

> capacity, injunctive relief shall not be granted unless a declaratory decree was violated or dēclaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This action arises from the September 30, 2001 arrest of Mr. Miller, as a result of an unlawful stop by Officer Harget of the City of Riverdale Police Department. Officer Harget testified that he was on duty in the area around the HomeTown Inn in Riverdale, Georgia in a marked patrol car at approximately 10:15 p.m. on September 30, 2001. He stated that he observed the vehicle that Mr. Miller was driving weaving between lanes without signaling and making an improper turn into the parking lot of the HomeTown Inn. Only after witnessing the traffic code violations did Officer Harget decide to investigate this matter. Appendix 3a. Plaintiff, Mr. Miller, testified that he drove to and from Lithonia, Georgia without committing any traffic code violations and entered the parking of HomeTown Inn without violating any traffic rules. He testified by affidavit that he properly maintained his lane, used his blinker signal to turn right and executed a turn into the HomeTown Inn without crossing outside of the lane adjacent to the HomeTown Inn for this purpose. Appendix 3a. Officer Terry J. Harget, a police officer with the City of Riverdale Police Department, drove his patrol car behind Mr. Miller and parked in a position to block the movement of Mr. Miller's car. Officer Harget activated his video by turning on his patrol car's police lights and shined a side light at Mr. Miller in the car in which he was the driver.

Officer Harget testified only after observing the erratic driving did he make an investigative stop of Plaintiff. Officer Harget further testified that he asked if Mr. Miller had been drinking and that Mr. Miller admitted to him of having had a few beers. Mr. Miller denied that he made that statement or that he had drunk any alcohol that night. Officer Harget did not administer a field sobriety test. Officer Harget did after stopping the vehicle request that the Plaintiff take a breathalyzer test.

Officer Harget had in his vehicle a video camera and recorded by video the entire scene of the stop and subsequent arrest. Officer Harget was responsible for maintaining the videotape according to the City of Riverdale police policy. The video was never produced by Officer Harget, even after request by Mr. Miller.

This was Mr. Miller's fourth encounter with Officer Harget. Mr. Miller had been detained three times earlier by Officer Harget. The first encounter incurred in the common areas of the HomeTown Inn located in Riverdale, Georgia. Mr. Miller and two other men were outside of their rooms talking to one another. Officer Harget walked up to Mr. Miller and the two other men and ran warrant and background checks on all three individuals. The second encounter occurred approximately two months later. On August 30, 2001 Officer Harget stopped Mr. Miller. At that stop Officer Harget issued a citation for an expired tag on Mr. Miller's car. On that occasion he also asked Mr. Miller to take a breathalyzer test without any evidence of alcohol consumption and threatened to take apart Mr. Miller's car in an attempt to locate illegal drugs. The third stop occurred on or about September 15, 2001. Officer Harget stopped

Mr. Miller for allegedly making too wide a u-turn. Officer Harget issued no citations during this stop. All of these stops occurred in and around the HomeTown Inn.

As a result of the stop on September 30, 2001, four charges were brought against Petitioner Miller. Petitioner was charged with driving while under the influence, no proof of insurance, having an open container with alcohol in the vehicle, and improper lane change. A trial was had on these charges. At the time of trial, the prosecutor for Clayton County, Georgia dismissed the no proof of insurance charge and the driving while under the influence charge. The only charges for which Mr. Miller was prosecuted were improper lane change and having an open container with alcohol in the vehicle. The jury acquitted Mr. Miller on both of these charges.

Subsequent to this trial on criminal charges, Mr. Miller brought a civil action against Respondents in the State Court of Clayton County, Georgia. This was removed by Officer Harget and the City of Riverdale to Federal Court since Mr. Miller included a claim pursuant to 42 U.S.C. § 1983. Mr. Miller alleged a violation of his constitutional rights under 42 U.S.C. § 1983 as well as state law claims for false imprisonment and malicious prosecution.

The trial court below granted summary judgment to Officer Harget in the City of Riverdale based upon *Johnson v. Crooks*, 326 F.3d 995 (8th Cir. 2003). The trial court concluded that Plaintiff Miller could not create a factual dispute by simply denying the facts to which Officer Harget testified. This, in fact, was not the case, since Plaintiff Miller affirmatively stated the acts he took which were contrary to the observations of Officer Harget. The Eleventh Circuit

concluded that, "[e]ven if the District Court believes that the evidence presented by one side is of doubtful veracity, it is not proper to grant summary judgment on the basis of credibility choices." Appendix 9a. The Eleventh Circuit Court of Appeals then goes on to determine that "Mr. Miller's acquittal and the evidence adduced at that trial, which is included in the record on appeal, demonstrates that there may be a factual dispute regarding Officer Harget's reasonable suspicion that Mr. Miller committed traffic violations." Appendix 10a. The U.S. Court of Appeals for the Eleventh Circuit then opines that officers are free, without any level of suspicion, to approach citizens on the street or in a public place and ask them questions, request proof of identification and a consent to search." Appendix 11a. However, at the time of the approach by Officer Harget Mr. Miller was in a closed car in a private parking lot at the HomeTown Inn where he was a paying resident. Officer Harget had articulated a pretextural reason for probable cause to stop and detain Plaintiff Miller. Officer Harget did not approach Mr. Miller on the street or in a public place. The Eleventh Circuit Court of Appeals opinion is based upon the rationale that Officer Harget had the authority to approach Plaintiff Miller without probable cause as required under the Fourth Amendment for an investigative stop. It is only then that the Court of Appeals for the Eleventh Circuit thereafter finds that there is probable cause for Mr. Miller's detention and subsequent arrest. It is based upon this subsequent investigation and not any facts prior to the actual stop of Mr. Miller that the Court of Appeals for the Eleventh Circuit finds any basis that probable cause existed.

Mr. Miller petitions this court for review of the Eleventh Circuit's decision holding that no probable cause is required to stop an individual in a private parking lot for a search

without a warrant where there is a disputed factual issue as to whether or not the officer had any probable cause to make such stop.

REASONS FOR GRANTING THE PETITION

This court announces a very specific standard in the case of *Terry v. Ohio*, 392 U.S. 1 (1968) concerning what constitutes a warrantless search and seizure. In that case the court held that the reasonableness of any particular search and seizure must be assessed in light of the particular circumstances against the standard of whether a man of reasonable caution is warranted in believing that the action taken was appropriate.

The court further went on to state that "[i]t must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry, supra*, at 16. The Eleventh Circuit Court of Appeals has further elaborated on the Fourth Amendment concept of seizure by stating that "only when, by means of physical force or a show of authority, [a person's] freedom of movement is restrained" is there a seizure. *United States v. Perez*, 443 F.3d 772 (11th Cir. 2006), at 778. The Eleventh Circuit then goes on to opine that Officer Harget did not put on a "show of authority" when he parked his patrol car behind the car in which Mr. Miller was driving and there was no seizure (Appendix 12a) and further stated that the fact that Officer Harget turned on his window lights in addition to blocking the movement of the Best vehicle, does not necessarily make his approach of Mr. Miller a coerced detention. Appendix 13a.

The Eleventh Circuit's decision is contrary to the decisions of this court and there is currently numerous instances in which Fourth Amendment right to be free from unreasonable searches and seizures are being disregarded on the pretext that a police officer, parking a police vehicle with police lights flashing does not indicate a show of authority or restrict a person's freedom of movement. There would be no way to reconcile this thought process with the thought process that a person was not fleeing the scene or was not resisting arrest by running from a parked police car flashing its police lights immediately behind the car in which that person was driving. In the attempt to invoke "qualified immunity" and avoid issues of fact requiring a jury trial, the constitutional rights of individuals are being unreasonably curtailed. Police authority is being expanded to the point that the civil rights of individuals are sacrificed to expediency.

This court should grant certiorari to address the issue of what constitutes an unreasonable search and seizure and what constitutes probable cause.

I. THE ELEVENTH CIRCUIT'S STANDARD OF WHAT CONSTITUTES A SEARCH AND SEIZURE VIOLATES *TERRY v. OHIO*, 392 U.S. 1 (1968) AND ITS SUBSEQUENT CONSTRUCTION.

The Court of Appeals for the Eleventh Circuit clearly finds that there are material issues of genuine fact in connection with the probable cause asserted by Officer Harget in stopping and detaining Mr. Miller with respect to traffic violations that occurred prior to Officer Harget actually speaking with Mr. Miller. Appendix 10a. ["But Mr. Miller's acquittal in the evidence adduced at that trial, which is included in the record on appeal, demonstrates that there may

be a factual dispute regarding Officer Harget's reasonable suspicion that Mr. Miller committed traffic violations."] In order to invoke the principle of "qualified immunity" the Court of Appeals for the Eleventh Circuit goes on to opine that whether a reasonable person would feel free to terminate the encounter with a police officer may be determined by the courts using several factors. The first is whether a citizen's path is blocked or impeded, whether identification is retained, the suspect's age, education and intelligence, the language and tone of voice of the police and other matters. This is based upon the opinion in *United States v. Perez*, 443 F.3d 772 at 778 (11th Circuit 2006).

The concept of a reasonable person argument as to what constitutes a search and seizure, in fact, is fundamental to the authority of the police to exercise the police power. In this instance Officer Harget pulled his patrol car up immediately behind the car in which Mr. Miller was driving. He turned his side light on Mr. Miller and turned on his flashing police car lights. (This activates the video camera in his patrol car.) At this point Officer Harget has made a determination to conduct a search and seizure based upon his own judgment. Officer Harget claims that Mr. Miller committed traffic offenses warranting the use of police power. The question the Court of Appeals for the Eleventh Circuit fails to address in its analysis is whether or not Mr. Miller would have lowered his window to speak with Officer Harget unless Officer Harget's patrol car was parked directly behind the vehicle in which Mr. Miller was traveling and the lights from Officer Harget's car were flashing. This was a show of authority and Mr. Miller, properly yielded to this. *California v. Hodari D.*, 499 U.S. 621 (1991).

The Fourth Amendment requires that there be probable cause for a stop. Mr. Miller was not walking down a public street. Mr. Miller was not on a public thoroughfare. Mr. Miller was parked in a private parking lot. This is not a public area. The property is privately owned. The right to be on private property is fundamentally different from access to public venues. The presence of police on private property must be in connection with a call or based upon probable cause unless the Officer merely happens to be there for personal business. Unless the police are directed to be on the premises by the owner or occupier of land, the police would have no greater authority to be on private land than any other individual absent the exercise of police powers.

The principles contained in the Fourth Amendment against unreasonable searches and seizures should not be lightly disregarded in an attempt to provide immunity from suit to police officers. A police state is one in which the police may without probable cause arbitrarily exercise police powers over the citizens of that state. The constitutional provision against unreasonable searches and seizures clearly states that there needs to be reasonable cause for such search and seizure. The Eleventh Circuit Court of Appeals ignores and, in fact, authorizes an unreasonable search and seizure by virtue of allowing the use of the police power, a show of authority by parking a car immediately behind the vehicle in which Mr. Miller was driving, and invoking police authority by using police lights flashing and a side light focused on Mr. Miller, to open the way for the subsequent investigation of Mr. Miller. It is only after Mr. Miller lowered his window (App. 14a) and speaks with Officer Harget that Officer Harget testifies that he smelled alcohol coming from the vehicle, saw a white container in the car, found that there was no proof of insurance and required Mr. Miller to take a

breathalyzer test. The Court of Appeals for the Eleventh Circuit only then states that there is probable cause for Mr. Miller's subsequent detention and arrest. Prior to the point where Mr. Miller lowers the window and begins a conversation with Officer Harget, all the facts as to whether or not there is a reasonable suspicion of criminal activity afoot is in dispute. Mr. Miller only yields—lowering the window to an investigative stop—to Officer Harget's show of authority. Whether this authority was lawful is in dispute.

In *Cowles v. Peterson*, 344 F. Supp. 2d 472 (E.D. Va. 2004), a police officer without probable cause, stopped a driver because of his personal knowledge of previous encounters with the driver of the vehicle. In that case the court stated that "an officer who stops and detains a person for investigative questioning must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Cowles, supra* at 480.

The assertion by the Court of Appeals for the Eleventh Circuit that this was a consensual encounter between Officer Harget and Mr. Miller is in error. App. 14a. This court has held that a person has been seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the instant, a reasonable person would have believed that he was not free to leave. *California v. Hodari D.*, 499 U.S. 621 (1991). While Mr. Miller may have been stopped because of his decision to return to his hotel room, he did not have a consensual encounter with Officer Harget. The standard that the court has previously applied is what the reasonable person would under similar circumstances believe as to whether or not a seizure had occurred. The parking of Officer Harget's police patrol car

immediately behind the vehicle occupied and being driven by Mr. Miller would be a show of authority. The flashing police lights would indicate that a police investigation was underway. Mr. Miller would be in the position of believing as a reasonable person that he was not allowed to go any further without first being subject to questioning by Officer Harget. The Terry stop was initiated when Officer Harget pulled his patrol car out of the position in which it had been placed and moved it directly behind the vehicle driven by Mr. Miller.

The show of authority concept as announced in *Terry, supra*, and as applied in *Brower v. County of Inyo*, 489 U.S. 593 (1989) cannot be applied in a vacuum. By using the rationale from the Court of Appeals for the Eleventh Circuit, Mr. Miller should not have been arrested at all. Based upon the rationale from the Court of Appeals for the Eleventh Circuit, Mr. Miller was stopped in a car parked in a parking lot. Whatever occurred prior to that event was not the basis for any action that Officer Harget took. Therefore, there would be no indication that Officer Harter witnessed Mr. Miller driving the car prior to finding him in the parked car. If Mr. Miller was singularly placed in a car, without any proof of insurance, with an open container, and simply refused to take a breathalyzer test, then it would be up to the police officer to prove that Mr. Miller had been driving the vehicle or had intended to drive the vehicle, and without such proof the police officer could not charge the individual in question with any crime. It is not unlawful to sit in a vehicle and not have insurance for a parked vehicle. While it is unlawful to have an open container in a vehicle, no one can be arrested for that offense. Under Georgia law the only sanction for a violation of that code provision is the payment of a fine. O.C.G.A. § 40-6-253(c). There is no prison time

and an arrest of an individual for an open container offense is not warranted. Finally, no proof of insurance is only a crime if you are operating a motor vehicle without proof of insurance.

This court has observed that not all personal intercourse between policemen and citizens involves seizures of persons. It is only when the officer, by means of physical force or "show of authority," has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred. *Michigan v. Chesternut*, 486 U.S. 567 (1988). This court should not further erode the protections provided by the Fourth Amendment by permitting lower courts to manufacture consensual encounters out of police investigations initiated by means of physical force or a show of authority. If an individual yields to the show of authority, then the police power has been exercised and the interests of the law have been served. If courts contort the circumstances under which a show of authority exists, then the interests of the law have not been served and one of two equally bad results occur. Either respect for the law is diminished or the rights secured by the blood and death of brave men and women who have fought and continue to fight for American values and justice for over two centuries fade away as a result of judicial expediency. Neither result should be condoned by the ultimate arbiter of constitutional protections. *Marbury v. Madison*, 1 Cranch 137 (1803). The constitution is a grant of power from the people to the government. The Bill of Rights was created to protect the people from the government. The doctrine of "qualified immunity" was created by the courts to protect government servants from claims arising out of proper conduct in their governmental functions—not the arbitrary use of governmental power—and the legislated right for redress of grievances. 42 U.S.C. § 1983. It should

not be allowed to influence the construction of Fourth Amendment seizures. The Court of Appeals for the Eleventh Circuit would have the tail wag the dog.

Mr. Miller was seized when Officer Harget turned on his police lights and parked his patrol car in a position to block Mr. Miller's vehicle. The question of probable cause occurs prior to any discussion between Officer Harget and Mr. Miller. Mr. Miller yielded to Officer Harget's show of authority. Mr. Miller's arrest and detention caused him to lose income and to be incarcerated. Mr. Miller's constitutional rights were violated.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MAURICE J BERNARD, III
Attorney for Petitioner
3717 Chamblee Dunwoody Road
Atlanta, Georgia 30341
(678) 530-0900

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED AUGUST 4, 2006

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-13573

D.C. Docket No. 03-03168-CV-TWT-1

RAYMOND ANTHONY MILLER,

Plaintiff-Appellant,

versus

TERRY J. HARGET,
CITY OF RIVERDALE,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(August 4, 2006)

Before EDMONDSON, Chief Judge, and BIRCH and ALARCÓN*, Circuit Judges.

ALARCÓN, Circuit Judge:

Raymond Miller appeals from the entry of summary judgment in favor of Officer Terry Harget of the City of

* Honorable Arthur L. Alarcón, United States Circuit Judge for the Ninth Circuit, sitting by designation.

Appendix A

Riverdale Police Department and the City of Riverdale ("the City"). Mr. Miller brought a complaint under 42 U.S.C. § 1983 against Officer Harget and the City, asserting, among other things, a violation of the Fourth Amendment arising from an encounter with Officer Harget that eventually led to Mr. Miller's arrest. The District Court concluded that Officer Harget had probable cause to stop and arrest Mr. Miller and that no constitutional violations had occurred. We conclude that the initial encounter between Mr. Miller and Officer Harget was non-coercive and that no detention triggering the protection of the Fourth Amendment occurred until Officer Harget reasonably suspected Mr. Miller of a crime. Mr. Miller's arrest was supported by probable cause. Accordingly, we affirm.

I

In his deposition and affidavits filed in opposition to the motion for summary judgment, Mr. Miller testified as follows. On September 30, 2001, Mr. Miller had an early dinner with two acquaintances at a Mexican restaurant near the HomeTown Inn, an extended stay hotel where Mr. Miller was living at the time. He was staying at the hotel in order to shorten his commute to work. On weekends, he would stay with his family in the nearby town of Lithonia. While at the restaurant, Mr. Miller met Amy Best.

Mr. Miller and Ms. Best decided to leave the restaurant together. Because Ms. Best had been drinking, she designated Mr. Miller as the driver of her car, a '84 or '85 white Pontiac Firebird. They visited Mr. Miller's family in Lithonia, which was about twenty-five miles away. They then returned to

Riverdale. They intended to stop at the HomeTown Inn, prior to Mr. Miller driving Ms. Best to her home.

Mr. Miller drove from Lithonia, without committing any traffic code violations, and entered the parking lot of HomeTown Inn. After he entered the parking lot, he drove toward the back of the building. He was hoping to park in the back, close to where his room was located. There were no spaces available, so he parked his car in front of the HomeTown Inn.

In his deposition and affidavit filed in support of his motion for a summary judgment, Officer Harget testified that he was on duty in the area around the HomeTown Inn in a marked patrol car at approximately 10:15 p.m. He was parked in the entrance of the public storage facility near the HomeTown Inn, observing traffic. From this position, he observed the Best vehicle weave in between lanes without signaling and make an improper turn into the parking lot of the HomeTown Inn. After witnessing the traffic code violations, Officer Harget decided to investigate.

Officer Harget pulled into the parking lot and parked directly behind the already parked Best vehicle. Then, Officer Harget "initialed" his "window lights" and beeped his siren to let the occupants know he was there. Officer Harget did not flash his roof lights. He got out of his car and approached the window on the driver's side.

When Officer Harget reached the front door on the driver's side, Mr. Miller, who was still seated in the vehicle, lowered the window. Officer Harget testified that when the

window was lowered, he smelled alcohol immediately. He also testified that Mr. Miller's eyes were bloodshot and glassy and that there was a white, non-translucent cup in the cup-holder nearest to Mr. Miller.

Officer Harget told Mr. Miller "he was stopping [him] because [he] had made too wide a turn into the HomeTown Inn parking lot." Ms. Best responded: "You are a liar!" Officer Harget asked Mr. Miller for his driver's license. He produced it.

Mr. Miller testified that Officer Harget asked him if Ms. Best was his girlfriend. Ms. Best responded that it was none of Officer Harget's business. Mr. Miller testified that Officer Harget then asked him what he was planning to do that night. Mr. Miller responded that he was getting ready to go upstairs for a minute, come back down, and take Ms. Best home. Mr. Miller testified that Officer Harget responded: "Yeah, right."

Officer Harget testified that he took Mr. Miller's driver's license and insurance information back to his patrol vehicle and performed a warrant check on Mr. Miller. He found no warrants. The date on the insurance card Mr. Miller provided showed that his car insurance had expired.

Because Ms. Best repeatedly called Officer Harget a liar, Officer Harget radioed for back up. He then re-approached the Best vehicle. Officer Harget testified that he asked Mr. Miller if he had been drinking, and that Mr. Miller admitted to having had a few beers. In his deposition

testimony, Mr. Miller denied that he made that statement or that he drank any alcohol that night.

Officer Harget asked Mr. Miller to perform a breathalyzer test, but Mr. Miller refused. Mr. Miller testified that he refused to take the test because "Officer Harget had lied when he said I made too wide of a turn into the parking lot. I felt that his-he would lie that I went above the limit."

Officer Harget asked Mr. Miller to step out of the car. As he stepped out of the vehicle, Mr. Miller dropped some papers onto the floorboard of the Best vehicle. Officer Harget again asked Mr. Miller to perform a breathalyzer test. Mr. Miller again refused. After Mr. Miller's second refusal, Officer Harget placed him under arrest. Officer Harget informed Mr. Miller he was under arrest for DUI. He read Mr. Miller the implied consent notice for suspects over the age of twenty-one, including the provision that a "refusal to submit to the required testing may be offered against you at trial."[1] Mr. Miller refused to take the test required under

---

1. Under Georgia law,

> any person who operates a motor vehicle upon the highways or elsewhere throughout the state [is] deemed to have given consent . . . to a chemical test or tests of his or her blood, breath, urine or other bodily substances for the purpose of determining the presence of alcohol or any other drug, if arrested for any offense arising out of acts alleged to have been in violation of [Georgia's driving under the influence statute] . . .

Ga.Code Ann. § 40-5-55 (2004). The test is to be administered "as soon as possible at the request of a law enforcement officer having (Cont'd)

Georgia law. Officer Harget then escorted Mr. Miller to a patrol car and placed him in the back seat.

Other officers responded quickly to Officer Harget's call for backup. Although the other police officers dealt primarily with Ms. Best, Officer M.E. Taylor also observed Mr. Miller's condition. Officer Taylor testified that in his opinion,

---

(Cont'd)
reasonable grounds to believe that the person has been driving" under the influence of alcohol. Ga.Code Ann. § 40-5-67.1 (2004). At the time the test is requested, the officer must read the following to drivers over the age of twenty-one:

> Georgia law requires you to submit to state administered chemical tests of your blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your Georgia driver's license or privilege to drive on the highways of this state will be suspended for a minimum period of one year. Your refusal to submit to the required testing may be offered into evidence against you at trial. If you submit to testing and the results indicate an alcohol concentration of 0.08 grams or more, your Georgia driver's license or privilege to drive on the highways of this state may be suspended for a minimum period of one year. After first submitting to the required state tests, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances at your own expense and from qualified personnel of your own choosing. Will you submit to the state administered chemical tests of your (designate which tests) under the implied consent law?

Id. at § 40-5-67.1(b)(2).

Mr. Miller appeared to have been drinking. Officer Taylor testified that Mr. Miller's eyes were glassy, his movements were lethargic, and that he smelled of alcohol.

Officer Harget testified that after placing Mr. Miller under arrest, he retrieved the white cup. It smelled of alcohol. Officer Harget poured out the contents of the cup and placed the cup back in Ms. Best's car. Mr. Miller testified that there was no cup in the vehicle.

After he was arrested, Mr. Miller was transferred to the Riverdale Police Department. He was again given the opportunity to take a state administered blood-alcohol test. He refused. He was issued four traffic citations: DUI; Open Container; Improper Lane Change; and No Proof of Insurance.[2] The Solicitor's office issued a *nolle prosequi* for the No Proof of Insurance and the DUI charge. Mr. Miller was acquitted of the remaining two charges at trial.

Following his acquittal, Mr. Miller filed a complaint in federal court against Officer Harget and the City under § 1983. He alleged that his Fourth, Sixth and Fourteenth Amendment rights were violated because he was arrested without probable cause. He also asserted state law claims for false arrest and malicious prosecution.

The District Court entered summary judgment in favor of Officer Harget and the City of Riverdale. Mr. Miller has timely appealed from the District Court's final judgment.[3]

---

2. Officer Harget testified that he did not recall whether he wrote the citations at the scene of Mr. Miller's arrest or at a later time.

3. Mr. Miller does not appeal the District Court's ruling with regard to his Sixth and Fourteenth Amendment claims.

Appendix A

II

A

Mr. Miller argues that the District Court erred in entering summary judgment in favor of Officer Harget on his claim that his Fourth Amendment rights were violated. He contends that Officer Harget effectuated a traffic stop in pulling up behind the parked Best vehicle and approaching him. He argues that the detention was not supported by reasonable suspicion because he did not in fact commit a traffic code violation. Mr. Miller maintains that the District Court erred in granting summary judgment in favor of Officer Harget and the City because he demonstrated that there are genuine issues of material fact in dispute regarding whether he committed any traffic violation.

In contending that the detention and arrest of Mr. Miller were valid, Officer Harget posits that Mr. Miller cannot "create a factual dispute by simply denying everything." Accordingly, he asks us to disregard certain portions of Mr. Miller's testimony that seem to conflict with Officer Harget's. The District Court accepted this theory, relying on *Johnson v. Crooks,* 326 F.3d 995 (8th Cir.2003). We review the decision of a district court *de novo.* Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Lippert v. Cmty. Bank, Inc.*, 438 F.3d 1275, 1278 (11th Cir.2006). We decline to adopt today the Eighth Circuit's rule in *Johnson.* We can affirm anyway and need not worry much about *Johnson.*

Even if the district court believes that the evidence presented by one side is of doubtful veracity, it is not proper to grant summary judgment on the basis of credibility choices. *See, e.g., Bischoff v. Osceola County,* 222 F.3d 874, 876 (11th Cir.2000) (holding that in a § 1983 action against the county and sheriff, it was error for the district court to resolve factual dispute and make credibility choices on material issues just by relying on reading of warring affidavits); *Harris v. Ostrout,* 65 F.3d 912, 916-17 (11th Cir.1995) (holding that in a § 1983 action against prison officials, affidavits by fellow inmates created a triable issue of fact precluding summary judgment); *Perry v. Thompson,* 786 F.2d 1093, 1095 (11th Cir.1986) (holding that where defendants' affidavits directly contradicted prison officers' version of events, there was a "square, head-on dispute of material facts" precluding summary judgment).

Mr. Miller's affidavits and deposition squarely contradict Officer Harget's version of the events. In his affidavit, Officer Harget contends that he based his decision to arrest Mr. Miller for driving under the influence of alcohol on the following facts: (1) his failure to maintain his lane of traffic; (2) his failure to signal when turning into the parking lot of the HomeTown Inn; (3) the odor of alcohol coming from within the vehicle and from Mr. Miller; (4) Mr. Miller's bloodshot glassy eyes; (5) Mr. Miller's admission that he consumed alcohol; (6) Mr. Miller's uncoordinated mannerisms and that he dropped some documents while exiting the vehicle; (7) the presence of the non-translucent white cup containing what Officer Harget believed to be alcohol; and (8) Mr. Miller's refusal to take breathalyzer tests.

Mr. Miller testified that he did not violate any traffic laws. He testified that he had not been drinking. He alleged in an affidavit that there was no irregularity to his mannerisms or speech, that he was not uncoordinated, and that he did not have any problems standing, talking, or hearing. Although he could not state what his eyes looked like because he did not look in a mirror, he testified that he did not have any problems with his vision. Mr. Miller further testified that he did not admit to Officer Harget that he had been drinking. He denied that there was a non-translucent white cup in his car containing alcohol.

Officer Harget is correct in arguing that Mr. Miller's subsequent acquittal is not determinative of whether Officer Harget had reasonable suspicion or probable cause. "The Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted-indeed, for every suspect released." *Baker v. McCollan,* 443 U.S. 137, 145, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979). But Mr. Miller's acquittal and the evidence adduced at that trial, which is included in the record on appeal, demonstrates that there may be a factual dispute regarding Officer Harget's reasonable suspicion that Mr. Miller committed traffic violations.

B

We may affirm the District Court on any basis supported by the record. *Williams v. BellSouth Telecomm., Inc.,* 373 F.3d 1132, 1139 (11th Cir.2004). The District Court concluded that Mr. Miller was seized, for Fourth Amendment purposes, when "the officer approached the vehicle, smelled

alcohol, and observed the Plaintiff's appearance." Prior to that, the District Court concluded that "there was no detention of the Plaintiff." We agree.

In *United States v. Perez,* 443 F.3d 772 (11th Cir.2006), this Court explained that there are three types of encounters between police and citizens "for purposes of . . . Fourth Amendment analysis: (1) police-citizen exchanges involving no coercion or detention; (2) brief seizures or investigatory detentions; and (3) full-scale arrests." *Id.* at 777 (citing *United States v. Hastamorir,* 881 F.2d 1551, 1556 (11th Cir.1989)). This Court noted that an encounter that does not involve coercion or detention "does not implicate Fourth Amendment scrutiny." *Id.* (quoting *United States v. Espinosa-Guerra,* 805 F.2d 1502, 1506 (11th Cir.1986)). Officers are free, without any level of suspicion, to approach citizens on the street or in a public place and ask them questions, request proof of identification, and a consent to search. *Id.; see also Florida v. Royer,* 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion) ("law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions"). "If a reasonable person would feel free to terminate the encounter, then he or she has not been seized." *Perez,* 443 F.3d at 777-78 (emphasis omitted) (quoting *United States v. Drayton,* 536 U.S. 194, 200-01, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002)); *see also United States v. Mendenhall,* 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) (Stewart, J.) (articulating "free to leave"

test). In determining whether a "reasonable person would feel free to terminate the encounter," courts consider several factors: "whether a citizen's path is blocked or impeded; whether identification is retained; the suspect's age, education and intelligence; the length of the suspect's detention and questioning; the number of police officers present; the display of weapons; any physical touching of the suspect, and the language and tone of voice of the police." *Perez,* 443 F.3d at 778 (quoting *United States v. De La Rosa,* 922 F.2d 675, 678 (11th Cir.1991)).

This Court has decided on several occasions that a police officer does not seize an individual merely by approaching a person in a parked car. *See United States v. Baker,* 290 F.3d 1276, 1277 (11th Cir.2002) (officer approached vehicle stopped in traffic), *De La Rosa,* 922 F.2d at 677 (officer approached individual as he walked away from a parked car); *United States v. Thompson,* 712 F.2d 1356, 1358 (1983) (officer approached individual sitting in parked car). Here, the time that preceded Officer Harget's arrival at the driver's side of the Best vehicle was extremely brief. Before Mr. Miller voluntarily lowered the window, Officer Harget did not do anything that would appear coercive to a reasonable person. For example, he did not draw his gun, give any directions to Mr. Miller, or activate his roof lights.

Mr. Miller contends that he was detained or seized when Officer Harget parked behind him. We disagree. The record shows that Mr. Miller intended to walk to his room after voluntarily parking the car. It is not dispositive that Officer Harget would have prevented Mr. Miller from backing Ms. Best's car out of the parking space. In *De La Rosa,* two

police officers in unmarked cars followed Mr. De La Rosa as he

> proceeded to his apartment across the street and used a special pass in order to open a security gate into the parking lot. Before the gate closed, one of the police officers ... entered the complex. After [Mr. De La Rosa] parked and began walking toward his apartment, [the officer] positioned his unmarked police car directly behind [Mr. De La Rosa's] vehicle, approached [Mr. De La Rosa], identified himself as a police officer, and asked [Mr. De La Rosa] if he could speak with him.

De La Rosa, 922 F.2d at 677. This Court concluded in *De La Rosa* that no seizure had occurred. *Id.* at 678. In the instant matter, Mr. Miller did not demonstrate that he had any intent to back out of the parking space when Officer Harget pulled up behind him.

The fact that Officer Harget turned on his "window lights," in addition to parking behind the Best vehicle, does not necessarily make his approach of Mr. Miller a coerced detention. In *United States v. Dockter,* 58 F.3d 1284 (8th Cir.1995), a police officer "pulled his vehicle behind [the defendants'] parked car and activated his amber warning lights." *Id.* at 1287. The court concluded that "[t]here was no behavior by the officer that would differentiate this encounter from one where an officer approaches a stranded motorist to offer assistance." *Id.* In this case, Officer Harget testified that he initiated his lights so that Mr. Miller would know that he was there. *See also Perez,* 443 F.3d at 778

(concluding that when, among other things, police officer "briefly flashed his blue lights, but only to identify himself as a police officer because he arrived at the scene in an unmarked car," no detention occurred).

Briefly stated, the ultimate inquiry is whether Officer Harget's initiation of his lights and placement of his vehicle exhibited coercion that would make Mr. Miller feel he was not free to leave. Neither of these facts by itself is dispositive: rather, we consider them in light of the totality of the circumstances. *See Perez,* 443 F.3d at 778. Considering the fact that the first contact between Mr. Miller and Officer Harget did not occur until Mr. Miller lowered the window, the fact that Officer Harget pulled up behind Mr. Miller and turned on his "window lights" does not demonstrate that Mr. Miller was coercively detained. "On this record, viewing the totality of the circumstances, there was no 'show of authority that communicate[d] to the individual that his liberty [was] restrained, meaning he [was] not free to leave.' " *Perez,* 443 F.3d at 778 (quoting *Baker,* 290 F.3d at 1278).[4]

---

4. It is irrelevant whether Officer Harget intended to detain Mr. Miller when he parked his patrol car behind the Best vehicle, flashed his lights, and approached the driver's side window. As Professor LaFave has explained:

> In exploring the meaning of the [free-to-leave] standard, certainly the first matter deserving of attention is the emphatic statement that the uncommunicated intention of the officer is not determinative . . . . [ ]The objective nature of the test also means that whether an encounter has become a seizure "depends on the officer's objective behavior, not any subjective suspicion of criminal

(Cont'd)

Although Officer Harget did not seize Mr. Miller simply by parking behind the Best vehicle and approaching it on foot, it is clear that Officer Harget did detain him after smelling alcohol in the vehicle. *See Perez,* 443 F.3d at 777 (discussing different types of seizures under the Fourth Amendment). A detention is reasonable under the Fourth Amendment if "the officer's action is supported by reasonable suspicion to believe criminal activity 'may be afoot.' " *Arvizu,* 534 U.S. at 273, 122 S.Ct. 744 (quoting *United States v. Sokolow,* 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989)). To determine if an officer had reasonable suspicion, courts "must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *Id.* (quoting *United States v. Cortez,* 449 U.S.

(Cont'd)

> activity"; in other words, it is *not* the case that an "officer can engage in a consensual encounter only with citizens whom he does not suspect of wrongdoing."[ ]

4 Wayne LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.4(a), at 413-14 (4th ed.2004) (quoting *United States v. Waldon,* 206 F.3d 597 (6th Cir.2000)); *see also Brower v. County of Inyo,* 489 U.S. 593, 596-97, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989) ("a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement . . . , nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement . . . , but only when there is a governmental termination of freedom of movement *through means intentionally applied.*").

411, 417-18, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)). Officers may "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' " *Id.* (quoting *Cortez,* 449 U.S. at 418, 101 S.Ct. 690); *see also Thompson,* 712 F.2d at 1361 (stating that reasonable suspicion is based on "articulable and specific facts known to [the officer] when the seizure occurred").

Mr. Miller argues that a genuine issue of material fact exists with regard to whether he violated the traffic laws. While that may be true, it is undisputed that Officer Harget smelled alcohol when Mr. Miller lowered the window. It is also undisputed that one occupant of the car, Ms. Best, had been drinking. Because Mr. Miller was the driver of the vehicle, and may have consumed alcohol, Officer Harget was justified in detaining him to determine whether he had been driving under the influence of alcohol. Under these circumstances, a prudent officer could question the driver and ask the driver to take a breathalyzer test. *See, e.g., Arvizu,* 534 U.S. at 277, 122 S.Ct. 744 (stating that an officer "need not rule out the possibility of innocent conduct" in order for reasonable suspicion to exist) (citing *Illinois v. Wardlow,* 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000)). Therefore, when Officer Harget smelled alcohol coming from the vehicle Mr. Miller had been driving, he had reasonable suspicion to detain Mr. Miller in order to investigate.

C

Arrests must be based on probable cause. "A warrantless arrest without probable cause violates the Constitution and

provides a basis for a section 1983 claim." *Kingsland,* 382 F.3d at 1226. Probable cause exists when "the facts and circumstances within the officers' knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Rankin v. Evans,* 133 F.3d 1425, 1435 (11th Cir.1998) (quoting *Williamson v. Mills,* 65 F.3d 155, 158 (11th Cir.1995)).

The record shows that Officer Harget had probable cause to arrest Mr. Miller after he completed the investigation triggered by reasonable suspicion that Mr. Miller was driving under the influence of alcohol. First, Officer Harget witnessed Mr. Miller driving. Second, Officer Harget smelled alcohol emanating from the interior of the vehicle when Mr. Miller lowered the window. Third, Mr. Miller refused to take a breathalyzer test.

Whether or not Officer Harget had probable cause to arrest Mr. Miller because the officer smelled alcohol coming from the vehicle, the officer did have reasonable suspicion. He reasonably detained Mr. Miller in order to investigate whether he had been driving under the influence. From this detention, probable cause developed, justifying Mr. Miller's arrest, because Mr. Miller refused to take a breathalyzer test.

A prudent officer could conclude from a refusal to take a test, coupled with the smell of alcohol, that the driver had in fact been drinking. *See Rankin,* 133 F.3d at 1435 (stating that test for probable cause is what a prudent officer would believe); *see also Long v. State,* 271 Ga.App. 565, 610 S.E.2d

74, 77 (Ga.Ct.App.2004) (noting that evidence of a refusal to take a blood-alcohol test is admissible against a person charged with driving under the influence); Ga.Code Ann. § 40-5-67.1(b)(2) (giving notice to those who refuse to submit to a blood-alcohol test that their refusal is admissible as evidence at trial). Submitting to a breathalyzer test is a minor inconvenience for a driver and an easy opportunity to end a detention before it matures into an arrest. Mr. Miller chose not to endure this minor inconvenience. It was reasonable for Officer Harget to view this choice as evidence of guilt. Any other conclusion would tie the hands of law enforcement in their efforts to keep intoxicated drivers off the streets. If a driver refused to submit to a test after an officer smelled alcohol, the officer would have no choice but to let him or her go, absent other evidence the driver had been drinking.

In this case, Officer Harget reasonably sought the information he needed to confirm whether Mr. Miller had been drinking. A driver cannot escape arrest simply by refusing to cooperate. We therefore conclude that Mr. Miller's refusal to take a breathalyzer test, coupled with the smell of alcohol from the vehicle, gave Officer Harget probable cause to arrest him. This conclusion is consistent with *Summers v. State of Utah*, 927 F.2d 1165 (10th Cir.1991), in which the Tenth Circuit wrote: "The undisputed facts regarding plaintiff's operation of his vehicle, the officer's scent of alcohol emanating from the vehicle and plaintiff's refusal to take a field sobriety test substantiate the .. . conclusion" that the officer had probable cause. *Id.* at 1166.[5]

---

5. It is also undisputed that Mr. Miller dropped papers while exiting the vehicle. Officer Harget interpreted this as evidence of (Cont'd)

Appendix A

III

Mr. Miller argues that Officer Harget stopped him because he is African-American and with an intent to harass him, not because he was suspected of criminal activity. It is well-settled that an officer's subjective motivations do not affect whether probable cause existed. *Whren v. United States,* 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (concluding that subjective motivations are irrelevant with regard to validity of a traffic stop); *Arkansas v. Sullivan,* 532 U.S. 769, 771-72, 121 S.Ct. 1876, 149 L.Ed.2d 994 (2001) (concluding that subjective motivations are irrelevant with regard to validity of an arrest); *Durruthy v. Pastor,* 351 F.3d 1080, 1088 n. 5 (11th Cir.2003) ("[t]here is no question that an officer's subjective intent is immaterial when there is an objectively reasonable basis for believing that an offense has occurred").[6]

We conclude that Mr. Miller has failed to produce evidence creating a genuine issue of material fact with regard to his Fourth Amendment claim. No detention or seizure of

---

(Cont'd)

intoxication. We need not discuss the reasonableness of this inference as it relates to a determination of probable cause because we conclude that the fact that Mr. Miller was driving a vehicle, an odor of alcohol emanated from its interior, and his refusal to submit to a field sobriety test was sufficient to give Officer Harget probable cause to arrest. We also need not reach the question whether Officer Harget had probable cause to arrest Mr. Miller based on his failure to provide proof of insurance.

6. Mr. Miller does not argue that Officer Harget violated his right to equal protection.

Mr. Miller occurred until he lowered the window of his vehicle and Officer Harget smelled alcohol. The smell of alcohol was sufficient to give Officer Harget reasonable suspicion that Mr. Miller had been driving under the influence of alcohol. As Officer Harget engaged in a reasonable investigation, including requesting that Mr. Miller submit to a breathalyzer test, Mr. Miller refused to cooperate. This refusal gave Officer Harget probable cause to arrest Mr. Miller.

IV

Mr. Miller next argues that the City is liable for a violation of his Fourth Amendment rights. Because Mr. Miller has failed to establish that his constitutional rights were violated, he has necessarily failed to establish the City's liability. *See City of Los Angeles v. Heller,* 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) (concluding that when no constitutional violation is demonstrated, there is no basis for which to hold municipality liable).

V

Finally, Mr. Miller argues that the District Court erred in entering summary judgment in favor of Officer Harget and the City on his state law claims of false imprisonment, false arrest and malicious prosecution. Each of these claims requires a showing that the defendant acted without probable cause. *Adams v. Carlisle,* 278 Ga.App. 777, 630 S.E.2d 529, 534-35 (Ga.Ct.App.2006). Because we have concluded that Officer Harget had probable cause to arrest Mr. Miller, Mr. Miller's state law claims also fail.

AFFIRMED.

APPENDIX B — ORDER AND OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION DATED MAY 27, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE
NO. 1:03-CV-3168-TWT

RAYMOND A. MILLER,

Plaintiff,

v.

TERRY J. HARGET, et al.,

Defendants.

ORDER AND OPINION

This is a civil rights action brought pursuant to 42 U.S.C. § 1983. It is before the Court on the Defendants' Motion for Summary Judgment [Doc. 23]. For the reasons set forth below, the Defendants' motion is GRANTED.

I. BACKGROUND

This case arises out of Plaintiff Raymond A. Miller's arrest for driving under the influence of alcohol by Defendant

Appendix B

Officer Terry J. Harget, a City of Riverdale police officer. Officer Harget contends that the Plaintiff was arrested after he observed the Plaintiff weaving between lanes without signaling and later observed other signs indicating that the Plaintiff had been drinking. The Plaintiff claims that he did not commit any traffic violations and was stopped by Officer Harget simply because he is an African American.

On September 30, 2001, the Plaintiff ate at a Mexican restaurant in Riverdale, Georgia. The restaurant is in close proximity to the HomeTown Inn, an extended stay hotel where the Plaintiff was living at the time. While at the restaurant, the Plaintiff met Amy Vandeveer Best. The two left the restaurant together in Ms. Best's 1985 white Pontiac Firebird. Ms. Best had been drinking that night, but the Plaintiff alleges that he had not. The Plaintiff offered to drive Ms. Best home. Instead of driving to Ms. Best's home, the two drove to the Plaintiff's cousin's home in Lithonia, Georgia. Around 10:00 p.m., the Plaintiff and Ms. Best were returning to Riverdale and approaching the HomeTown Inn, traveling south on Highway 85.

At that time, Officer Harget, on duty with the City of Riverdale Police Department, was stationed at a public storage facility on the east side of Highway 85 and near the HomeTown Inn. At approximately 10:15 p.m., Officer Harget testified that he observed the white Firebird weaving in between lanes without signaling. He contends that the vehicle then made a wide swinging right turn into the HomeTown Inn parking lot. Based upon these observations, Officer Harget initiated a traffic stop after the Plaintiff pulled into a parking space. Officer Harget approached the vehicle and

the Plaintiff rolled down his window. Officer Harget claims that he noticed the smell of alcohol as the window was lowered. Lowering himself toward the window to inform the Plaintiff that he was being pulled over for making too wide of a turn into the hotel, Officer Harget noticed that the Plaintiff's eyes were bloodshot and glassy. Officer Harget also claims to have noticed a white, nontranslucent cup containing liquid in the cup holder in the console closest to the Plaintiff.

Officer Harget requested the Plaintiff's license and registration and ran a warrant check. There were no outstanding warrants, but the insurance card that the Plaintiff had provided was expired. Returning to the vehicle, Officer Harget informed the Plaintiff that he smelled the odor of alcohol coming from him. Officer Harget asked the Plaintiff if he had been drinking. Officer Harget claims that the Plaintiff admitted to having had a few beers. The Plaintiff denies making this statement. At that time, Officer Harget requested that the Plaintiff perform a field sobriety test. The Plaintiff refused. Officer Harget informed the Plaintiff that he intended to arrest him on suspicion of driving under the influence of alcohol and requested that he exit the vehicle. After the Plaintiff exited the vehicle, Officer Harget states that he once again requested that the Plaintiff perform a field sobriety test. The Plaintiff again refused. At that time, Officer Harget placed the Plaintiff under arrest and placed him in the back of another officer's cruiser. He then performed a search of the vehicle incident to the arrest, retrieving the cup of liquid and smelling the contents. Officer Harget contends that he concluded that the cup contained an alcoholic beverage.

Appendix B

In the initial stages of the traffic stop, Officer Harget had requested backup. The backup request was made after Ms. Best, the passenger in the vehicle, had repeatedly called Officer Harget a liar and had become increasingly belligerent and agitated. After arriving on the scene, the officers that responded to Officer Harget's request dealt primarily with Ms. Best. However, one officer, M.E. Taylor, testified that he was also able to observe the Plaintiff, who smelled of alcohol and appeared to be drunk. In addition, Officer Harget stated that two of the officers on the scene smelled the liquid in the cup and concurred with his assessment that it was an alcoholic beverage.

Officer Harget issued uniform traffic citations to the Plaintiff for the following offenses: (1) DUI-refusal; (2) open container; (3) improper lane change; and (4) no proof of insurance. The Plaintiff pled not guilty to the charges. After subsequently being provided with proof that the Plaintiff had current insurance, the Clayton County Solicitor's Office nolle prossed the no proof of insurance charge. The Solicitor's Office also nolle prossed the DUI-refusal charge. The open container and improper lane change charges, however, were tried to a jury in October of 2002. The jury acquitted the Plaintiff of both charges.

Following his acquittal, the Plaintiff brought suit against Officer Harget and the City of Riverdale, alleging violations of several of his constitutional rights. He alleges that his Fourth Amendment rights were violated because the traffic stop and arrest were without probable cause. He alleges that he was not informed of the nature and cause of the accusation against him, in violation of the Sixth Amendment. Finally,

he asserts a claim under the Fourteenth Amendment, alleging that his due process and equal protection rights were violated. In addition, the Plaintiff asserts claims for false arrest, under O.C.G.A. § 51-7-1, and malicious prosecution, under O.C.G.A. § 51-7-40, against Officer Harget. The Defendants move for summary judgment on these claims.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The court should view the evidence and any inferences that may be drawn in the light most favorable to the nonmovant. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The burden then shifts to the nonmovant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

III. DISCUSSION

A. *42 U.S.C. § 1983*

Section 1983 does not create substantive rights itself. Rather, it provides a private cause of action for an individual whose federally protected rights have been violated by an

individual acting under color of state law. *See* 42 U.S.C. § 1983; *Graham v. Connor,* 490 U.S. 386, 393-94 (1989). Therefore, for every section 1983 claim, the plaintiff must identify a right secured by the Constitution or laws of the United States that has been violated by a state actor. *American Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 49-50 (1999); *Focus on the Family v. Pinellas Suncoast Transit Authority,* 344 F.3d 1263, 1276-77 (11th Cir. 2003). Here, the Plaintiff alleges that the Defendants violated his Fourth, Sixth, and Fourteenth Amendment rights.[1]

Before addressing the merits of each constitutional claim, the Court notes that the Plaintiff has asserted these claims against both the City of Riverdale and Officer Harget. It is unclear whether the suit is brought against Officer Harget in his official or individual capacity, or both. Suits brought under section 1983 against an individual in his official capacity are equivalent to suits brought against the entity which the official represents. *Kentucky v. Graham,* 473 U.S. 159, 165-66 (1985); *Jones v. Cannon,* 174 F.3d 1271, 1293 n.15 (11th Cir. 1999). Therefore, to the extent that the Plaintiff asserts his section 1983 claims against Officer Harget in his official capacity, these claims are redundant and summary judgment for Officer Harget is proper. *See Busby v. City of Orlando,* 931 F.2d 764, 776 (11th Cir.

---

1. The Fourth Amendment applies to the states through the Fourteenth Amendment. *Ingraham v. Wright,* 430 U.S. 651, 673 n.42 (1977); *Garrett v. Athens-Clarke County, Ga.,* 378 F.3d 1274, 1279 n.9 (11th Cir. 2004). An accused's Sixth Amendment right to be informed of the nature and cause of accusation against him is also applicable to the states through the Fourteenth Amendment. *Gannett Co., Inc. v. DePasquale,* 443 U.S. 368, 379 (1979).

1991). To the extent that the Plaintiff asserts his claims against Officer Harget in his individual capacity, these claims are discussed below.

1. *Fourth Amendment: Officer Harget*

The Plaintiff contends that his Fourth Amendment rights were violated because he was stopped and arrested without probable cause. A traffic stop, even for a brief period of time, constitutes a seizure within the meaning of the Fourth Amendment. *United States v. Purcell,* 236 F.3d 1274, 1277 (11th Cir. 2001). Thus, in order to be constitutionally permissible, the stop must be "reasonable." *See Whren v. United States,* 517 U.S. 806, 809-10 (1996). A police officer will meet the reasonableness requirements of the Fourth Amendment typically in one of two ways. First, the officer may stop a vehicle if there is probable cause to believe that the driver has violated the law, including committing a traffic violation. *United States v. Cooper,* 133 F.3d 1394, 1398 (11th Cir. 1998). Second, the officer may perform a brief investigatory stop, even in the absence of probable cause, if the stop is supported by a reasonable suspicion of criminal activity. *See Terry v. Ohio,* 392 U.S. 1, 20 (1968); *United States v. Mikell,* 102 F.3d 470, 474 (11th Cir. 1996).

Probable cause exists if "the facts and circumstances within the officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Kingsland v. City of Miami,* 382 F.3d 1220, 1226 (11th Cir. 2004). There is no precise test for determining

probable cause. Rather, probable cause is based on "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Wheeler v. City of Macon,* 52 F. Supp. 2d 1372, 1377 (M.D. Ga. 1999) *(quoting Brinegar v. United States,* 338 U.S. 160, 175 (1949)). Therefore, courts must look to the "totality of the circumstances" in determining whether probable cause exists. *Illinois v. Gates,* 462 U.S. 213, 231-32 (1983). Furthermore, probable cause requires only reasonably trustworthy information, not overwhelmingly convincing evidence. *Ortega v. Christian,* 85 F.3d 1521, 1525 (11th Cir. 1996); *Gainor v. Douglas County, Georgia,* 59 F. Supp. 2d 1259, 1280 (N.D. Ga. 1998). The type of specific evidence of each element needed to support a conviction is not necessary to establish the existence of probable cause. *Adams v. Williams,* 407 U.S. 143, 149 (1972); *Holmes v. Kucynda,* 321 F.3d 1069, 1079 (11th Cir. 2003). Thus, the mere fact that a criminal defendant is subsequently acquitted or the charges are dropped does not affect the determination of whether probable cause existed. *See Knight v. Jacobson,* 300 F.3d 1272, 1275 (11th Cir. 2002).

When a police officer observes a traffic violation, regardless of how minor it may be, he has probable cause to stop the driver of the vehicle. See *United States v. Taverna,* 348 F.3d 873, 877 (10th Cir. 2003) ("A traffic stop is justified at its inception if it is based on an observed traffic violation."); *United States v. $404,905.00 in U.S. Currency,* 182 F.3d 643, 646 (8th Cir. 1999) ("[A] police officer who personally observes a traffic violation has probable cause to stop the vehicle and offending driver."). Officer Harget testified that he initiated the traffic stop after he witnessed

the Plaintiff failing to maintain his lane of traffic and making too wide of a turn into the HomeTown Inn parking lot without signaling. (Harget Aff. ¶¶ 14, 19, Ex. B; Harget Dep. at 38-39.) At the time he observed the Plaintiff, Officer Harget was monitoring traffic in a stationary position with an unobstructed view of the highway. (Harget Dep. at 38.) Based on his observations, Officer Harget issued the Plaintiff a traffic citation for improper lane change, in violation of O.C.G.A. § 40-6-48. (Harget Aff., Ex. B.). This charge was pursued to trial by the Clayton County Solicitor's Office.

The Plaintiff denies that he was weaving or that he made a wide turn without signaling. Therefore, he contends that a material factual dispute exists regarding whether Officer Harget had probable cause to stop him. However, there was no detention of the Plaintiff until after the officer approached the vehicle, smelled alcohol, and observed the Plaintiff's appearance. This was reasonable suspicion to justify an investigatory stop. The police officer must "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry,* 392 U.S. at 21; *see also United States v. Arvizu,* 534 U.S. 266, 273 (2002) ("[T]he Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity 'may be afoot.'"). It is undisputed that the Plaintiff then refused a sobriety test. That constituted probable cause for an arrest. Thus, there is no triable issue of fact as to whether the traffic stop violated the Plaintiff's Fourth Amendment rights. *See Johnson v. Crooks,* 326 F.3d 995, 998-99 (8th Cir. 2003) (motorist's mere denial that she committed traffic offense was not sufficient to preclude summary judgment if stop was

objectively reasonable); *Valance v. Wise,* 110 F.3d 1269, 1275-76 (7th Cir. 1997) (plaintiff's testimony that he did not cross the center traffic line, and thus that there was no probable cause for a traffic stop, established only what the plaintiff believed and did not cast doubt on what the officer reasonably believed); *Cuautle v. Tone,* 851 F. Supp. 1236, 1240 (C.D. Ill. 1994) (plaintiff failed to present evidence, other than his bare assertion, that he did not illegally change lanes and thus failed to create an issue of fact as to whether the defendant had probable cause to arrest him).

In addition, Officer Harget had probable cause to believe that the Plaintiff had committed another traffic offense: no proof of insurance, in violation of O.C.G.A. § 40-6-10.[2] The insurance card that the Plaintiff provided to Officer Harget was expired. (Harget Aff. ¶ 21.) The Supreme Court has held that an officer who lawfully arrests an individual, even for minor offenses and traffic violations, does not violate the Fourth Amendment when he initiates a full custodial arrest. *See Atwater v. City of Lago Vista,* 532 U.S. 318, 354-55 (2001); *Draper v. Reynolds,* 369 F.3d 1270, 1276 n.8 (11th Cir. 2004); *Lee v. Ferraro,* 284 F.3d 1188, 1196 (11th Cir. 2002). Under Georgia law, failure to maintain proof of insurance is a misdemeanor, punishable by a "fine of not less than $200.00 nor more than $1,000.00 or imprisonment for not more than 12 months, or both." O.C.G.A. § 40-6-

2. The fact that this charge resulted in a nolle prosequi by the Clayton County Solicitor's Office, after proof that the Plaintiff was insured was subsequently provided, does not affect the determination that Officer Harget had probable cause at the time to believe that the Plaintiff had committed a traffic violation. *See* Knight, 300 F.3d at 1275.

10(4). Furthermore, officers of Georgia municipalities have the authority to arrest for misdemeanors. *See* O.C.G.A. § 40-13-30. Thus, Officer Harget did not violate the Fourth Amendment right when he arrested the Plaintiff.[3]

Although the Plaintiff attempts to create an issue of fact regarding whether there was probable cause for his arrest, the main thrust of his argument rests on the allegation that Officer Harget's stated reasons for stopping and arresting him were pretense. He contends that Officer Harget stopped and arrested him, in violation of the Fourth Amendment, simply because he is African American. The Supreme Court has held that an officer's actual motives do not affect the reasonableness of a traffic stop. *Whren,* 517 U.S. at 812-13; *Draper,* 369 F.3d at 1275. Instead, the "constitutional 'reasonableness' of a traffic stop must be determined irrespective of 'intent,' whether of the particular officers involved or of the theoretical 'reasonable officer.'" *United States v. Holloman,* 113 F.3d 192, 194 (11th Cir. 1997). Allegations of intentionally discriminatory application of the law are properly addressed in an equal protection, rather than Fourth Amendment, challenge. Subjective intentions have

---

3. The fact that Officer Harget informed the Plaintiff that he was arresting him for DUI rather than for no proof of insurance does not affect the validity of the arrest. *See Lee,* 284 F.3d at 1195-96 ("The validity of an arrest does not turn on the offense announced by the officer at the time of the arrest. Indeed, when an officer makes an arrest, which is properly supported by probable cause to arrest for a certain offense, neither his subjective reliance on an offense for which no probable cause exists nor his verbal announcement of the wrong offense vitiates the arrest.") (citations and punctuation omitted).

no bearing on a probable cause Fourth Amendment analysis. *Whren,* 517 U.S. at 813. Because the Court finds that the traffic stop and subsequent arrest of the Plaintiff were objectively reasonable, there was no Fourth Amendment violation, regardless of any alleged ulterior motives of Officer Harget. Summary judgment for Officer Harget is therefore warranted.

2. *Fourth Amendment: City of Riverdale*

The Plaintiff also asserts his Fourth Amendment claim against the City of Riverdale. A municipality may not be held liable for the wrongful actions of its employees on a *respondeat superior* theory. *See Monell v. Department of Social Services of City of New York,* 436 U.S. 658, 690-91 (1978); *Gold v. City of Miami,* 151 F.3d 1346, 1350 (11th Cir. 1998). Instead, a municipality will be liable only if the plaintiff can establish that an official custom or policy of the municipality was the "moving force" behind the deprivation of a constitutional right. *Board of County Com'rs of Bryan County. Okl. v. Brown,* 520 U.S. 397, 404 (1997); *Gold,* 151 F.3d at 1350. Consequently, to succeed on a section 1983 claim against a municipality, a plaintiff must demonstrate that a constitutional deprivation occurred and that the deprivation occurred: (1) pursuant to an officially promulgated policy; (2) as the result of a decision made by an official with final policymaking authority for the municipality; or (3) as a result of actions taken pursuant to "custom or usage" with the force of law. *Monell,* 436 U.S. at 690-91. The Court has held that Officer Harget's actions did not violate the Plaintiff's Fourth Amendment rights. The Plaintiff cannot show that a policy, practice, custom or usage

was the moving force behind a violation of his rights when no underlying constitutional deprivation has been shown. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986); *Gainor v. Douglas County, Georgia*, 59 F. Supp. 2d 1259, 1291 (N.D. Ga. 1998).

Even if a Fourth Amendment violation could be established, the Plaintiff has failed to offer any evidence of a municipal custom or policy that caused the constitutional violation. The Plaintiff does not argue that Officer Harget has final policymaking authority for the City of Riverdale. Nor does the Plaintiff contend that the City or the police department has an officially promulgated policy authorizing unlawful arrests. Instead, the Plaintiff alleges that the City of Riverdale police department has an unwritten policy of racial discrimination that led to his unlawful arrest. In support of this contention, the Plaintiff states that the Assistant Chief of Police has been accused of having racist attitudes. He also points to the fact that a number of EEOC complaints have been filed by officers alleging discrimination within the department with regard to hiring, promotion, and termination practices. These assertions are insufficient to establish that the police department has a custom or policy of discrimination with regard to law enforcement practices.

Moreover, as discussed above, even if there was a policy of allowing officers to stop or arrest individuals based on race, the subjective motivations of officers are irrelevant to a Fourth Amendment analysis. Rather, the focus in a Fourth Amendment claim is whether the officer had probable cause to arrest the individual. The Plaintiff has not produced any evidence that he was arrested because of a policy that allowed

officers to initiate traffic stops or make arrests without probable cause. Nor has the Plaintiff produced evidence that the police department failed to train Officer Harget adequately regarding proper arrest procedures. To the contrary, the Riverdale Police Department Standard Operating Procedures instruct officers that arrests without warrants are to be made in limited situations only, including when the offense is committed in the presence of or within the officer's immediate knowledge. (Harget Aff., Ex. D.) Accordingly, the City of Riverdale is entitled to summary judgment on the Plaintiffs Fourth Amendment claim.

3. *Sixth Amendment*

The Sixth Amendment requires that in every criminal prosecution the accused shall be informed of the nature and cause of the accusation against him. U.S. Const. amend. VI. By its terms, the Sixth Amendment applies only to criminal prosecutions. *Little v. City of North Miami,* 805 F.2d 962, 968 (11th Cir. 1986); *see also Jones v. City of Jackson,* 203 F.3d 875, 880 (5th Cir. 2000) ("A defendant's right to be informed of the nature and cause of an accusation brought against him does not exist until the Government is committed to a prosecution."). The Sixth Amendment is not implicated until adversarial proceedings are commenced against the defendant. *Jones,* 203 F.3d at 880. Adversarial judicial proceedings include a formal charge, preliminary hearing, indictment, information, or arraignment. *Hardy v. Town of Hayneville,* 50 F. Supp. 2d 1176, 1185 (M.D. Ala. 1999) *(citing Kirby v. Illinois,* 406 U.S. 682, 689 (1972)).

Appendix B

The Plaintiff was informed of the charges against him prior to, or at least at the time of, the initiation of an adversarial judicial procedure. Although he had no Sixth Amendment right to be informed of the charges against him at the time of his arrest, it is undisputed that the Plaintiff was informed at the scene of the traffic stop that he was being arrested for driving under the influence. (Miller Dep. at 41; Harget Dep. at 67.) In addition, the Plaintiff received uniform traffic citations for all four offenses for which he was charged. (Harget Aff., Ex. B.) Under Georgia law, uniform traffic citations serve as the accusing document for traffic offenses. See O.C.G.A. § 17-7-71(b)(1); O.C.G.A. § 40-13-3. Therefore, the Plaintiff was adequately informed of the nature and cause of the accusation against him. Because no Sixth Amendment violation occurred, the Defendants are entitled to summary judgment.

4. *Fourteenth Amendment*

The Plaintiff also asserts a claim under section 1983 based on alleged violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. These issues will be addressed separately.

a. Substantive Due Process

The Plaintiff's substantive due process claim appears to arise out of the circumstances surrounding the traffic stop and his arrest. The Supreme Court has expressed reluctance to expanding the concept of substantive due process, preferring instead to limit the concept traditionally to matters relating to marriage, family, procreation, and the right to

bodily integrity. *Albright v. Oliver,* 510 U.S. 266, 271-72 (1994). Accordingly, the Court has held that the Due Process Clause does not provide relief when another constitutional provision provides an explicit textual source for protection. *See Albright,* 510 U.S. at 273-74; *Graham v. Connor,* 490 U.S. 386, 395 (1989). For instance, unlawful search and seizure claims fall squarely within the protections of the Fourth Amendment. *Albright,* 510 U.S. at 274; *see also Dorsey v. Wallace,* 134 F. Supp. 2d 1364, 1374 (N.D. Ga. 2000). The Plaintiff relies on the same facts to establish his Fourth and Fourteenth Amendment claims. But he has not indicated how his due process rights are different from his Fourth Amendment rights. Because the Fourth Amendment addresses the rights of individuals to be free from unlawful arrest, there is no basis for invoking the more generalized notion of due process. *See Graham,* 490 U.S. at 395. Summary judgment for the Defendants is warranted.

b. Equal Protection

The Plaintiff's equal protection claim is based on the allegation that he was subjected to racial profiling and selective enforcement of motor vehicle laws based on his race. *See Whren,* 517 U.S. at 813 ("[T]he Constitution prohibits selective enforcement of the law based on considerations such as race."). In order to establish unconstitutional selective enforcement of the law, the Plaintiff has the burden of establishing that the Defendants' actions had a discriminatory effect and were motivated by a discriminatory purpose. *See Durruthy v. Pastor,* 351 F.3d 1080, 1091 (11th Cir. 2003); *United States v. Lichenstein,*

610 F.2d 1272, 1281 (5th Cir. 1980)[4]; *see also Flowers v. Fiore,* 359 F.3d 24, 35 (1st Cir. 2004); *Johnson v. Crooks,* 326 F.3d 995, 1000 (8th Cir. 2003); *United States v. Barlow,* 310 F.3d 1007, 1010 (7th Cir. 2002); *Farm Labor Organizing Committee v. Ohio State Highway Patrol,* 308 F.3d 523, 533-34 (6th Cir. 2002). Although subjective intentions are not relevant to a Fourth Amendment analysis, they are material to a selective enforcement claim. Accordingly, the Court's determination that Officer Harget had probable cause to arrest the Plaintiff does not dispose of his Fourteenth Amendment equal protection claim. See *Whren,* 517 U.S. at 813.

To prove a discriminatory effect, the Plaintiff must show that a similarly-situated individual of another race could have been, but was not, arrested for the offense for which the plaintiff was arrested. *See Lichenstein,* 610 F.2d at 1281; *Washington v. Vogel,* 880 F. Supp. 1542, 1544 (M.D. Fla. 1995); *see also Farm Labor Organizing Committee,* 308 F.3d at 534; *United States v. James,* 257 F.3d 1173, 1179 (10th Cir. 2001); *Chavez v. Illinois State Police,* 251 F.3d 612, 636 (7th Cir. 2001). A discriminatory purpose may be shown by demonstrating that the decisionmaker selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon African Americans as a race. *See McCleskey v. Kemp,* 481 U.S. 279, 298 (1987). The Plaintiff may prove that he was a target of racial profiling by direct, circumstantial, or statistical evidence. *United States*

---

4. In *Bonner v. City of Prichard,* 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions the former Fifth Circuit rendered prior to the close of business on September 30, 1981.

v. Saucedo, 226 F.3d 782, 790 (6th Cir. 2000); *see also Swint v. City of Wadley, Ala.*, 51 F.3d 988, 1000 (11th Cir. 1995) ("Absent some evidence of racially disproportionate arrests compared to the actual incidence of violations by race, there is no basis for inferring racially selective law enforcement."). However, mere speculation that Officer Harget stopped and arrested him based on racial bias is insufficient to establish an equal protection claim. *See Johnson*, 326 F.3d at 995; *Saucedo*, 226 F.3d at 790.

The Plaintiff has failed to produce any direct, circumstantial, or statistical evidence of racial profiling or selective enforcement. He has not identified any similarly-situated individual of a different race who was treated more favorably. The Plaintiff relies on very minimal circumstantial evidence to establish his claim, namely his assertion that he did not commit any traffic violations and that he is an African American and Officer Harget is white. However, merely denying that a traffic offense occurred is insufficient to establish that the stop was a pretext for discrimination. *Washington*, 880 F. Supp. at 1544. Nor is an allegation that an arbitrary stop was initiated by an officer of a different race sufficient to establish an equal protection violation. *Johnson*, 326 F.3d at 1000. Furthermore, the undisputed evidence is inconsistent with the allegation that Officer Harget stopped the Plaintiff on the basis of his race. The traffic stop occurred at approximately 10:15 p.m. and the windows of the vehicle were tinted. Thus, there is no evidence that Officer Harget could have seen into the vehicle or known the race of the person driving when he made the decision to initiate the traffic stop. The Plaintiff has failed to present evidence to create a genuine issue of material fact that Officer

Harget's actions had a discriminatory effect and were motivated by a discriminatory purpose. Summary judgment for Officer Harget is warranted.

The Plaintiff also asserts his equal protection claim against the City of Riverdale, again based on the police department's alleged unwritten racist policies. The Court need not address whether the police department has any discriminatory policies. As noted above, municipal liability under section 1983 is derivative from the unconstitutional actions of its agents. *City of Los Angeles v. Heller,* 475 U.S. 796, 799 (1986). Because there was no unconstitutional conduct on the part of Officer Harget, summary judgment is therefore appropriate for the City of Riverdale.

B. ***State Law Claims***

Pursuant to Georgia law, the Plaintiff asserts claims of false arrest and malicious prosecution against Officer Harget. In order to establish either claim, the Plaintiff must establish the presence of malice and the absence of probable cause. *See* O.C.G.A. § 51-7-1; O.C.G.A. § 51-7-40; *Fleming v. U-Haul Co. of Georgia,* 246 Ga. App. 681 (2000). Lack of probable cause exists "when the circumstances are such as to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to injure the accused." O.C.G.A. § 51-7-3; *Stanford v. City of Manchester,* 246 Ga. App. 129, 131 (2000). The burden of establishing lack of probable cause is on the plaintiff. *See Monroe v. Sigler,* 256 Ga. 759, 760 (1987); *Stanford,* 246 Ga. App. at 131. The Plaintiff has failed to establish a genuine issue of fact as to a lack of probable cause. As discussed above, the Court finds that Officer Harget

possessed probable cause to initiate the traffic stop and arrest the Plaintiff. Additionally, the fact that the charges against the Plaintiff resulted in a nolle prosequi or acquittal is not sufficient to raise an issue of lack of probable cause. *Pinkston v. City of Albany,* 196 Ga. App. 43, 44 (1990) ("If the mere denial of having committed the crime is enough to raise an issue of false arrest, virtually all criminal prosecutions resulting in a nolle prosequi or acquittal could result in a civil lawsuit. Thus, [false arrest] actions are not favored unless they are strictly proved and accurately stated."); *K Mart Corn. v. Griffin,* 189 Ga. App. 225, 226 (1988) (acquittal does not equate to proof of lack of probable cause). The standard of proof applicable to criminal proceedings is much higher than the standard of proof applicable to findings of probable cause. *See Holmes v. Kucynda,* 321 F.3d 1069, 1079 (11th Cir. 2003); *United States v. Pantoja-Soto,* 739 F.2d 1520, 1524 n.7 (11th Cir. 1984). Summary judgment for Officer Harget on the Plaintiff's false arrest and malicious prosecution claims is proper.

IV. *CONCLUSION*

For the reasons set forth above, the Defendants' Motion for Summary Judgment [Doc. 23] is GRANTED.

SO ORDERED, this 27 day of May, 2005.

/s/ Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED OCTOBER 31, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-13573-EE

RAYMOND ANTHONY MILLER,

Plaintiff-Appellant,

versus

TERRY J. HARGET,
CITY OF RIVERDALE,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

BEFORE: EDMONDSON, Chief Judge, BIRCH and ALARCON,* Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant, Raymond Anthony Miller is DENIED.

---

* Honorable Arthur L. Alarcon, United States Circuit Judge for the Ninth Circuit, sitting by designation.

Appendix C

ENTERED FOR THE COURT:

s/ [illegible]
CHIEF JUDGE

(2)

No. 06-1258

FILED

APR 16 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

RAYMOND ANTHONY MILLER,

Petitioner,

vs.

TERRY J. HARGET and
THE CITY OF RIVERDALE, GEORGIA,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

BRIEF IN OPPOSITION

GEORGE T. TALLEY
Counsel of Record
TIMOTHY M. TANNER
COLEMAN, TALLEY, NEWBERN,
KURRIE, PRESTON & HOLLAND, LLP
910 N. Patterson Street
P.O. Box 5437
Valdosta, Georgia 31603-5437
Phone – 229-242-7562

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Statement of the Case	1
Reasons for Denying the Writ	3
I. No Seizure Took Place Until After Petitioner Voluntarily Lowered His Window	3
II. Subjective Intent Is Irrelevant	7
III. The Courts Of Appeals Are In Agreement	8
Conclusion	12

TABLE OF AUTHORITIES

Page

CASES

Betterton v. State, 527 So.2d 747 (1988) 11

Brower v. County of Inyo, 489 U.S. 593, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989) 7

California v. Hodari D., 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991) 4, 7

Cann-Hanson v. State, 223 Ga. App. 690 (1996) 5

Florida v. Bostick, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991) 3

Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983) 4, 6

Medley v. State, 630 So.2d 163 (Ala.Crim.App. 1993) 11

People v. Murray, 560 N.E.2d 309 (Ill. 1990) 11

State v. Culbreath, 387 S.E.2d 255 (S.C. 1990) 11

State v. Neyrey, 383 So.2d 1222 (La. 1979) 11

State v. O'Neill, 62 P.3d 489 (Wash. 2003) 11

State v. Sledge, 264 Ga. App. 612 (2003) 5, 6

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968) 3, 4, 6

United States v. Analia, 975 F.2d 119 (4th Cir. 1992) 10

United States v. Arvizu, 534 U.S. 266, 122 S. Ct. 744 (2002) 3

United States v. Baker, 290 F.3d 1276 (11th Cir. 2002) 8

TABLE OF AUTHORITIES – Continued

Page

United States v. Barry, 394 F.3d 1070 (8th Cir. 2005) 8

United States v. Castellanos, 731 F.2d 979 (D.C. Cir. 1984) 11

United States v. Hendricks, 319 F.3d 993 (7th Cir. 2003) 11

United States v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) 4, 5, 7, 9

United States v. Perez-Sosa, 164 F.3d 1082 (8th Cir. 1998) 11

United States v. Waldon, 2006 F.3d 597 (6th Cir. 2000) 7

RULE

Sup. Ct. R. 10 3

OTHER AUTHORITY

Wayne LeFave, *Search and Seizure: A Treatise on the Fourth Amendment* 9.4(a), at 413-14 (4th ed. 2004) 7

STATEMENT OF THE CASE

Petitioner misconstrues some of the underlying facts in an attempt to have his petition granted. For instance, Petitioner alleges that Officer Harget "drove his patrol car behind the vehicle he was driving and parked in a position to block the movement of Mr. Miller's car" (Pet. App. 3). What Petitioner fails to mention is that he had already parked his car and was preparing to exit. (Pet. App. 12a). Although the patrol car may have eventually blocked his car, at the time of the first encounter between Officer Harget and Petitioner, it did not. (Pet. App. 13a). Simply put, Officer Harget did not stop Petitioner's vehicle. Furthermore, Petitioner had no plan to immediately move his vehicle as he was preparing to walk to his hotel room.

Second, Petitioner alleges that Officer Harget had a video of this event but has refused to provide it. However, such allegation is mere speculation on Petitioner's part. There is no evidence that Officer Harget had an operational dash-mounted camera on September 30, 2001. Third, even if he did have the dash-mounted recording device, there is no evidence that it would have been activated by Officer Harget flashing only his side lights.

Fourth, Petitioner argues that Officer Harget did not administer a field sobriety test on Petitioner. This is true because Petitioner refused to participate in one. Petitioner admitted that Officer Harget stated, "I want you to take a breath test." Petitioner mistakenly calls this roadside test a breathalyzer.[1] It is not. As stated in Officer Harget's affidavit and deposition testimony, he requested Petitioner

[1] The Eleventh Circuit mistakenly called this a breathalyzer test as well.

perform an alcosensor test, which is a preliminary screening device that detects the presence of alcohol.[2] This is a field sobriety test. The "breathalyzer" is the state administered test performed on the "Intoxilyzer 5000". This test is performed after arrest to detect the suspect's blood alcohol content.[3]

Petitioner was not detained or seized until after Officer Harget smelled an alcoholic beverage emitting from the passenger compartment of the vehicle.[4] Although Petitioner attempts to construe the facts to say Officer Harget stopped him, Petitioner testified in his deposition that he drove around the Hometown Inn, his hotel, in search for a parking space close to his room. Unable to do so, Petitioner traveled to the front of the hotel. Petitioner was able to park before Officer Harget arrived. Furthermore, Petitioner admitted that when Officer Harget's patrol car approached, his lights were not flashing. When Officer Harget exited his car and approached the Petitioner's vehicle, the latter rolled down the window without command. At that time, the smell of alcoholic beverage came from within and Officer Harget noticed Petitioner's bloodshot and glassy eyes.

---

[2] If he had not been drinking, Petitioner, the holder of a commercial driving license, could have utilized this device to prove so.

[3] While not relevant to the question presented, Petitioner attempts to construe Officer Harget's arrest of him as one event in a continued pattern of harassment. Despite these allegations, Officer Harget does not concede the number of instances Petitioner alleges they had contact.

[4] Although Petitioner alleges that he was not drinking, he admitted that his passenger had.

REASONS FOR DENYING THE WRIT

The decisions reached in this matter do not conflict with a decision of this Court or any circuits. Furthermore, the lower decisions do not implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not demonstrated any "compelling reasons" for this Court to grant his Petition. *See* Sup. Ct. R. 10.

The crucial facts in this case can be divided into two separate periods separated by the singular event of Petitioner rolling down the window of his parked car. Petitioner asserts that Officer Harget seized him without probable cause when he pulled his patrol car behind him and flashed his lights. The Eleventh Circuit disagreed and ruled that these two factors alone did not constitute a seizure. The court also concluded that once Officer Harget smelled the alcohol emitting from the passenger compartment, he had, at minimum, "a reasonable suspicion that criminal activity 'may be afoot.'" (Pet. App. 15a) (*quoting United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744 (2002)). Consequently, the issue is whether those two events, in and of themselves, constitute a seizure within the meaning of *Terry v. Ohio*, 392 U.S. 1, 19, 88 S. Ct. 1868, 1879 (1968), and its progeny.

I. No Seizure Took Place Until After Petitioner Voluntarily Lowered His Window.

This Court has made it abundantly clear "that mere police questioning does not constitute a seizure." *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has

occurred." *See Florida v. Royer*, 460 U.S. 491, 497, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983) (plurality opinion) (*quoting Terry v. Ohio*, 392 U.S. 1, 19, 88 S. Ct. 1868, 1879 (1968). In *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980), this Court stated "a person has been seized within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Furthermore, the *Mendenhall* decision provided the following examples to help determine the difference between a consensual police-citizen encounter and a seizure:

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Id. at 554; *see also California v. Hodari D.*, 499 U.S. 621, 628, 111 S. Ct. 1547, 1552, 113 L. Ed. 2d 690 (1991).

Here, Officer Harget did not stop Petitioner. Petitioner freely parked the vehicle he was driving at a time and location of his choosing[5]. Officer Harget did not activate his emergency lights.[6] Rather, he flashed his side window

---

[5] Petitioner testified: "Yeah, my room is located around – upstairs toward the back of the building. But as I drove to the back there were cars parked back there, so I couldn't park where I usually parking at. So I park out front." P. 32, L. 23-25 – P. 33, L. 1.

[6] Q.: Did you park your car before Officer Harget pulled up?

A.: Yes.

(Continued on following page)

lights to let Petitioner know he was there. (Pet. App. 13a). There is no evidence that Officer Harget approached with his weapon drawn or any evidence he made a command over his loud speaker. Furthermore, Officer Harget was not loud or commanding.[7] Officer Harget was the only officer present and did not physically touch Petitioner prior to the development of probable cause, or at minimum, an articulable suspicion, that Petitioner was operating the vehicle under the influence of alcohol. None of the factors cited in *Mendenhall, supra,* are present.

The first contact between Petitioner and Officer Harget was when the former rolled down his window. Almost immediately, Officer Harget testified without opposition[8] that he smelled the odor of alcoholic beverage coming from within the passenger compartment of the vehicle. Officer Harget also testified without opposition[9] that Petitioner's eyes were red and bloodshot. At that point, without a word being exchanged, Officer Harget had, at minimum, a reasonable and articulable suspicion that Petitioner was driving under the influence. *See State v. Sledge*, 264 Ga. App. 612, 614 (2003) (*citing Cann-Hanson v. State*, 223 Ga. App. 690, 691 (1996) ("Even in the absence of the field sobriety tests, the officer's observation that [a suspect] had bloodshot, watery eyes and

---

Q.: When he pulled up did he have his lights flashing?

A.: No.

(Doc. 28, P. 32, L. 6-10).

[7] Doc. 39, P. 44, L. 20-25.

[8] Although Petitioner claims he had not been drinking, he admitted that his passenger had. Doc. 28, P. 38, L. 6-7.

[9] In affidavit testimony, Petitioner stated that he could not commit on the conditions of his eyes. Doc. 31-12, ¶26.

exuded an odor of alcohol was sufficient to show probable cause to arrest him for driving under the influence."). From that point forward, Officer Harget had the authority to briefly detain Petitioner to investigate further. *See Terry v. Ohio*, 392 U.S. 1 (1968). Once Petitioner refused to submit to any field sobriety tests, Officer Harget then had additional probable cause to arrest Petitioner for the offense of driving under the influence of alcohol. *See Sledge*, 223 Ga. App. at 691.

As this Court stated in *Royer*, 460 U.S. at 497,

> [L]aw enforcement officers did not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some question, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

Here, although Officer Harget approached Petitioner, the factors giving him reasonable suspicion were not the result of any questions or interrogation. The Fourth Amendment did not prevent Officer Harget from approaching Petitioner's parked vehicle and observing these possible signs of intoxication. At this point, Officer Harget would have been derelict in his duties not to investigate further.[10]

---

[10] Without support, Petitioner states that since he was in the parking lot of a hotel, and "not walking down a public street" or "on a public thoroughfare", Officer Harget's presence "must [have been] in connection with a call or based upon probable cause unless the Officer merely happen[ed] to be there for personal business." (Pet. App. 10). No

(Continued on following page)

II. Subjective Intent Is Irrelevant.

In two separate ways, Petitioner attempts to advance an argument that subjective intent should be considered. First, Petitioner advances the theory that, "[i]f an individual yields to the show of authority, then the police power has been exercised and the interests of the law have been served." (Pet. App. 13). Petitioner further attempts to persuade the Court by stating that once Officer Harget parked his cruiser behind Petitioner's, he had "made a determination to conduct a search and seizure based upon his own judgment." (Pet. App. 9).

Despite Petitioner's arguments, this Court has announced that subjective intent is irrelevant in the Fourth Amendment context. In *Hodari D.*, 499 U.S. at 628, this Court stated, "*Mendenhall* establishes that the test for existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." *See also* Wayne LeFave, *Search and Seizure: A Treatise on the Fourth Amendment* 9.4(a), at 413-14 (4th ed. 2004)[11]; *see also United States v. Waldon*, 2006 F.3d 597 (6th Cir. 2000); *Brower v. County of Inyo*, 489 U.S. 593, 596-97, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989). Consequently, Petitioner's arguments that he believed he had to obey

---

case law is provided by Petitioner that suggests a hotel parking lot, open to the public, is not also available to police officers. Literally, such an interpretation would drastically prevent law enforcement personnel from performing their duties.

[11] "In other words, it is not the case that an 'officer can engage in a consensual encounter only with citizens whom he does not suspect of wrongdoing.'"

Officer Harget and/or Officer Harget's' intentions to stop Petitioner are irrelevant when determining whether the seizure actually occurred.

III. The Courts Of Appeals Are In Agreement.

As the lower court pointed out, "police officer[s] do not seize an individual merely by approaching a person in a parked car." (Pet. App. 12a); *see United States v. Baker*, 290 F.3d 1276, 1277 (11th Cir. 2002). Not only has this Court settled this issue, there is no disagreement among the circuits when considering similar factual issues.[12]

In *United States v. Barry*, 394 F.3d 1070 (8th Cir. 2005), the Eighth Circuit Court of Appeals decided a very factually similar case to the case sub judice. In *Barry*, a police officer witnessed a vehicle parked in an alley behind a shopping mall. *Id.* at 1072. It was approaching midnight and most of the surrounding businesses were closed. *Id.* The police officer traveled down the alley and parked approximately fifteen feet in front of the vehicle. *Id.* The officer got out of his cruiser, shined his flashlight on his uniform and approached the car. *Id.* The officer's emergency lights were not activated. *Id.* As he approached, two individuals standing outside the vehicle re-entered it. *Id.* The police officer approached the passenger side window and tapped on it twice without response. *Id.* On the third knock, the passenger lowered his window and the smell of burnt marijuana came from inside. After he smelled the

[12] Petitioner does not cite any disagreement among the circuits. In fact, Petitioner fails to cite any cases with similar circumstances as here.

marijuana, the officer requested back-up and asked the occupants to exit the vehicle. *Id.*

A subsequent search revealed that one of the passengers was a convicted felon in possession of a handgun. *Id.* at 1073. In the following suppression hearing, the magistrate court suppressed the evidence and focused almost exclusively on "whether the police officer's intention to briefly detain the defendant pursuant to a Terry investigatory stop was based on reasonable suspicion of criminal activity." *Id.* The court stated:

> [T]o hold otherwise in this case would be tantamount to a finding that a police officer has the legal authority to make an investigative stop simply because the officer believed the vehicle is in a place it should not be, without an additional basis for believing that criminal activity is afoot.

Id.

The government appealed and the Eighth Circuit reversed. Using the examples cited in *Mendenhall*, 446 U.S. 554, the court ruled that individuals were not seized until the officer ordered them out of the vehicle. *Id.* at 1075. This was after the window was rolled down and the police officer smelled what he believed to be marijuana. *Id.* As for the officer's intentions, the Court stated it "has little or no influence on [the] Fourth Amendment analysis." *Id.* The defendant argued without success that he had been seized because (1) the position of police cruiser would have blocked his car from leaving the alley; (2) by the officer walking directly from the marked patrol car; (3) the police officer shining his flashlights on his uniform to identify himself; and (4) approaching with his hand positioned on his sidearm. *Id.* at 1076. The court rejected these arguments and stated the officer's "conduct [did] not constitute

a seizure, but instead reveal[ed] a uniformed police officer on duty cautiously approaching a vehicle at night, in a business alley area, to question the vehicle's occupants. This approach was, without more, simply an encounter between a police officer and a citizen." *Id.*

In the *United States v. Analia*, 975 F.2d 119, 121 (4th Cir. 1992), the defendant was seen talking on a pay telephone outside a convenience store. The defendant matched the description of a murder suspect. *Id.* After receiving a telephone call from the convenience store manager, two police cars arrived. *Id.* at 122. The officers parked their respective cars on each side of the defendant's vehicle at 45 degree angles. *Id.* The police officer approached the defendant, who was still on the telephone, and stated that he wanted to speak with him. *Id.* After the defendant hung up, the officer requested his license and registration. *Id.* While the officer was checking the license, a third officer arrived. *Id.* The third officer arrived and told the defendant that he matched the description of the murder suspect and requested permission to search the defendant's vehicle. *Id.* This search revealed incriminating evidence. *Id.* The police officers never told the defendant he could leave or refuse their requests. *Id.*

Defendant argued on appeal, that the evidence obtained during this search was illegally obtained because it was neither consensual nor based on the requisite level of objective justification. *Id.* at 123. The Fourth Circuit rejected this argument and held that despite the presence of three officers, no threats or intimidation took place and the encounter was consensual. *Id.* at 125.

Other circuit decisions agree with the lower courts' analysis and decision in this matter. *See United States v.*

Perez-Sosa, 164 F.3d 1082, 1084 (8th Cir. 1998) (holding that where driver did not see a trooper's flashing lights and ignored them, then pulled into a gas station and began fueling, the subsequent encounter between the officer and the motorist was a consensual encounter); *United States v. Castellanos,* 731 F.2d 979, 983-84 (D.C.Cir. 1984) (holding that no seizure occurred when park police officer requested identification from an individual seated in a parked automobile who appeared to be in physical distress); *United States v. Hendricks*, 319 F.3d 993 (7th Cir. 2003).[13]

In his Petition, Petitioner failed to point out any disagreement among the circuits as to whether similar factual scenarios constitute a seizure under the Fourth Amendment. Petitioner's reasoning for the omission of such argument is because circuit case law appears to uniformly support the decision from which he appeals.

---

[13] *See* the following state cases: *Betterton v. State*, 527 So.2d 747, 749-50 (1988); *People v. Murray*, 560 N.E.2d 309, 314 (Ill. 1990); *State v. Culbreath*, 387 S.E.2d 255, 257 (S.C. 1990); *Medley v. State*, 630 So.2d 163, 165 (Ala.Crim.App. 1993); *State v. O'Neill*, 62 P.3d 489 (Wash. 2003); *State v. Neyrey*, 383 So.2d 1222, 1224 (La. 1979)

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

GEORGE T. TALLEY
Counsel of Record
TIMOTHY M. TANNER
COLEMAN, TALLEY, NEWBERN,
KURRIE, PRESTON & HOLLAND, LLP
910 N. Patterson Street
P.O. Box 5437
Valdosta, Georgia 31603-5437
Phone – 229-242-7562

Counsel for Respondents